BRARY
SUPREME COURT, U.S.

FILED
OCT 16 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

MAX EISENBERG, on behalf of himself and all other stockholders of Central Zone Property Corporation, similarly situated,

Petitioner,

—against—

CENTRAL ZONE PROPERTY CORPORATION,

Respondent,

and

JOSEPH COHEN,

Referee-Respondent,

and

S. H. SCHEUER, MILLARD SHRODER and WILLIAM C. RUTH,

Defendants.

AND ANOTHER ACTION

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

MEMORANDUM OF RESPONDENT IN OPPOSITION

SIMON H. RIFKIND,
Counsel for Respondent,
575 Madison Avenue,
New York 22, N. Y.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON,
Attorneys for Respondent,
575 Madison Avenue,
New York 22, N. Y.

October 17, 1957.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 300

MAX EISENBERG, on behalf of himself and all other stockholders of Central Zone Property Corporation, similarly situated,

Petitioner,

—against—

CENTRAL ZONE PROPERTY CORPORATION,

Respondent,

and

JOSEPH COHEN,

Referee-Respondent,

and

S. H. SCHEUER, MILLARD SHRODER and WILLIAM C. RUTH,

Defendants.

AND ANOTHER ACTION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

MEMORANDUM OF RESPONDENT IN OPPOSITION

Petitioner's application for a writ of certiorari is patently frivolous and should be denied. It suffers on its face from a fatal deficiency—the clear absence of jurisdiction.

Facts

Petitioner, a lawyer (R. 395), holder of one-fortieth of one per cent of the stock of the respondent corporation (R. 399-401), brought two actions in the New York courts to restrain the execution of a plan of liquidation adopted by the vote of the stockholders (more than two-thirds having voted in favor of the plan and none having voted in opposition) (R. 413, 443, Plaintiff's exhibit 46). He ultimately succeeded in the New York Court of Appeals in entering judgment on the pleadings in the principal action, on the ground that the plan of liquidation was beyond the scope of the New York statutes (under which the plan was adopted, New York Stock Corporation Law, Sections 20 and 105), and therefore could not be carried out except upon the unanimous consent of all of the stockholders (306 N. Y. 58).

Having thus vindicated his power to veto the wish of the great majority of his fellow stockholders, petitioner applied for an allowance of attorney's fees (R. 55-144, 283-372). He had done all the legal work himself, except that he retained appellate counsel on the eve of the argument in the Court of Appeals (R. 1071-1072, 1614). He declared the value of the services performed by himself and his counsel to be $325,000 (R. 726)—roughly twenty per cent of the entire net worth of the corporation (R. 510-511, 1727, 2050).

On petitioner's application for an award of counsel fees for his services, a Special Term of the New York Supreme Court appointed a Referee to hear and report (R. 269). After lengthy hearings, and on the basis of 78 exhibits and testimony comprising 655

printed pages (R. pp. viii-xiii, 373-2339), the Referee reported that petitioner had conferred no pecuniary benefit on the corporation or its stockholders (R. 2468-2469, 2539). Nevertheless, for petitioner's services in preventing the corporation from transgressing the New York statutes, the Referee recommended a fee of $25,000 (R. 2545-2550). In making this recommendation, the Referee found that petitioner had begun the actions in good faith (R. 2375-2376).

Special Term approved and adopted in toto the conclusions and recommendations of the Referee (R. 27, 2850). In its order awarding petitioner a fee of $25,000, it adopted a further recommendation of the Referee (R. 2550-2551), by directing that payment of the fee should await the outcome of all litigation between the parties (R. 28).

On appeals from that order, the Appellate Division left all of the findings of Special Term undisturbed, except the finding with respect to petitioner's good faith. With the full record before it, the Appellate Division reversed the finding of good faith (R. 3024-3025), and modified the order below by reducing the award from $25,000 to $5,000 (1 App. Div. 2nd 353; R. 3023), and eliminating the provision that its payment should await the outcome of all litigation between the parties (R. 3023).

The New York Court of Appeals affirmed the Appellate Division's order of modification, unanimously and without opinion (3 N. Y. 2d 729). It later denied —again unanimously and without opinion—a motion by petitioner for leave to reargue (not yet reported; order of denial dated July 3, 1957).

ARGUMENT

Petitioner now seeks to invoke the jurisdiction of this Court by asserting that he has been deprived in these proceedings of the equal protection of the laws under the Fourteenth Amendment of the United States Constitution. The jurisdiction of this Court cannot be invoked, however, first, because no Federal question is, or ever has been, involved in these proceedings; and second, because petitioner did not raise, and thus did not preserve, his alleged Federal question in the State courts.

1. With a full trial record before it, the Appellate Division found, as a matter of fact, that petitioner had not begun the actions in good faith; and it evaluated the services rendered in these State actions by petitioner and his appellate counsel—both members of the New York Bar—at $5,000. These conclusions were twice reviewed and affirmed by the New York Court of Appeals—first on petitioner's appeal to that Court, and again on his motion for leave to reargue. Petitioner's claim that these conclusions are "arbitrary" and "discriminatory" is sheer fantasy. They are supported by ample evidence and by principles of state law in no way related to any right or immunity conferred by the Equal Protection (or any other) clause of the United States Constitution.

At best, petitioner's claim is that the conclusions of the New York courts were erroneous; or that the courts of some other state might have reached a different result. Of course, we would not concede either of these points. But even if petitioner were correct

in either claim, the results below would not amount to a denial of "equal protection". "In any case the Constitution of the United States does not guarantee that the decisions of state courts shall be free from error * * *." *Worcester County Trust Company* v. *Riley*, 302 U. S. 292, 299 (1937). Nor does the Fourteenth Amendment "assure uniformity of judicial decisions * * *." *Milwaukee Electric Railway & Light Company* v. *State of Wisconsin ex rel. City of Milwaukee*, 252 U. S. 100, 106 (1920).

2. Petitioner's failure to preserve his alleged Federal question in the State courts is apparent from the petition. His first and only reference in the State courts to "equal protection" appeared at page 8 of his brief in support of his motion in the Court of Appeals for leave to reargue (quoted at pp. 6 and 7 of the petition). This reference was neither adequate nor sufficiently timely to preserve for petitioner the Federal question that he now seeks to raise. It was not adequate, because it did not specifically assert an alleged right under the Federal (as distinguished from the New York State) Constitution. *Bowe* v. *Scott*, 233 U. S. 658, 664-665 (1914); *New York Central & Hudson River Railroad Company* v. *City of New York*, 186 U. S. 269, 273 (1902). It was not timely, because "it is elementary that a mere assertion in a state court of a right under the Constitution of the United States in a petition for rehearing affords no ground for invoking the jurisdiction of this court * * *." *Bowe* v. *Scott*, 233 U. S. 658, 663 (1914).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

SIMON H. RIFKIND,
Counsel for Respondent,
575 Madison Avenue,
New York 22, N. Y.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON,
Attorneys for Respondent,
575 Madison Avenue,
New York 22, N. Y.

October 17, 1957.